

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GORDON A. WILLETT,

Plaintiff-Appellant,

v

STATE FARM INSURANCE,

Defendant-Appellee.

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UNPUBLISHED

September 15, 2005

No. 255535

Ingham Circuit Court

LC No. 03-001578-CZ

Before: Meter, P.J., and Murray and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendant summary disposition under MCR 2.116(C)(10). This insurance case arises out of plaintiff's claim for insurance coverage to pay for personal belongings contained within his stolen vehicle. We affirm.

I. Facts and Proceedings

On August 27, 2002, plaintiff was on a fishing and hunting trip in Canada. While stopped for the night at a hotel in Montreal, plaintiff's truck and all the personal belongings contained in it were apparently stolen. Plaintiff reported the theft to his insurer, defendant, no later than September 9, 2002.

On September 13, 2002, defendant sent a letter to plaintiff, indicating that it needed various items in order to properly evaluate plaintiff's claim, including a copy of the police report, and numerous receipts. On September 23, 2002, plaintiff forwarded various documents. Plaintiff also provided a verbal, recorded statement of his loss and claim by telephone conference with a representative of defendant on October 9, 2002.

Also, on October 9, 2002, defendant sent plaintiff a second letter notifying plaintiff of his duties under defendant's homeowner's insurance policy. The letter informed plaintiff that he must submit a signed, sworn proof of loss within sixty days after the date of loss, which was being extended to commence from the date of the letter. The letter also informed plaintiff that failure to comply would be considered a breach of the policy and grounds for denial of plaintiff's claim. A blank "Sworn Statement in Proof of Loss" form was included with the letter.

On January 13, 2003, defendant sent a letter to plaintiff notifying him that his claim could not be accepted and was formally denied because plaintiff failed to submit a sworn statement in

proof of loss, and plaintiff failed to submit other proper documentation and evidence. On February 7, 2003, plaintiff forwarded a sworn proof of loss form to defendant, along with a letter from his attorney. On February 27, 2003, defendant, through its attorney, responded, stating that defendant was standing by its decision to deny plaintiff's claim of loss.

As a result, plaintiff filed a three-count complaint, alleging breach of contract and uniform trade practices violations, and seeking declaratory relief. More specifically, plaintiff sought a declaratory judgment that he did not fail or refuse to comply with his duties to provide the requested documentation and that defendant was obligated to pay him for his claimed loss. Plaintiff also alleged that defendant breached the subject insurance contract by denying payment to him. Last, plaintiff alleged that defendant failed to pay him for the amount of his loss within thirty days after defendant received proof of the amount of loss. Defendant responded, asserting various affirmative defenses, including that plaintiff's claim was barred by his failure to timely submit a sworn statement in proof of loss as required by the terms of his insurance policy with defendant.

Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that it was undisputed that plaintiff failed to comply with the terms and conditions of the insurance policy when he refused to provide defendant with a sworn statement in proof of loss within the first sixty days after the loss or within the additional sixty-day extension period. Plaintiff did not file a written response to defendant's motion, choosing instead to move for entry of a default judgment premised on defendant's failure to provide plaintiff's counsel with an actual copy of the subject insurance policy. Plaintiff's counsel asserted that because defendant's primary defense was based on a written instrument, the insurance policy, the pertinent parts were required to have been attached to defendant's pleadings. MCR 2.113(F)(1).

After hearing oral argument on the motions, the trial court found significant that the October 9, 2002 letter clearly informed plaintiff that he was required to sign and return the enclosed sworn statement form within sixty days. Accordingly, the court granted defendant summary disposition because plaintiff failed to timely submit the sworn statement in proof of loss. Turning to plaintiff's motion for default, the court concluded that a certified copy of the insurance policy was provided.

Plaintiff subsequently moved to amend his complaint to add a fourth count of fraud. Plaintiff sought to allege that defendant misrepresented what documents were required to be submitted to constitute a satisfactory proof of loss. After hearing oral arguments on the motion, the trial court denied plaintiff's motion to amend with respect to the first three counts because they were verbatim renditions of the counts in the original complaint, which the court previously dismissed. Turning to the fraud count, the court denied the motion to amend on the ground that the claim was futile for failure to establish the claim. The court explained that defendant did not misrepresent the requirement that plaintiff submit a sworn statement.

## II. Analysis

Plaintiff's first argument on appeal is that the trial court erred in granting defendant summary disposition. Plaintiff argues that defendant was estopped from asserting plaintiff's failure to file a sworn statement in proof of loss as a defense to his otherwise valid claim given

that defendant failed to specify what constituted a satisfactory proof of loss within thirty days of receipt of plaintiff's claim as required under MCL 500.2006(3). We disagree.

We review de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim, and when reviewing the motion, the court must consider all the documentary evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The proper interpretation of a statute is a question of law also subject to de novo review. *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997). Further, construction of clear contract language is a question of law for the court that is subject to de novo review. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002); *Hafner v DAIIE*, 176 Mich App 151, 156; 438 NW2d 891 (1989).

Generally, failure to timely provide a sworn statement in proof of loss within the explicit time requirement contained in the insurance policy is an absolute bar to an insured's recovery. *Dellar v Frankenmuth Mut Ins Co*, 173 Mich App 138, 145; 433 NW2d 380 (1988); *Reynolds v Allstate Ins Co*, 123 Mich App 488, 490-491; 332 NW2d 583 (1983); *Helmer v Dearborn Nat'l Ins Co*, 319 Mich 696, 700; 30 NW2d 399 (1948); *Fenton v Nat'l Fire Ins Co*, 235 Mich 147, 150; 209 NW 42 (1926). However, an insurer may waive the requirement by denial or admission of liability or the insurer may be estopped from asserting the requirement under certain circumstances. *Dellar, supra* at 145-147; *Helmer, supra* at 700; *Fenton, supra* at 150. Here, plaintiff does not contend that defendant waived the requirement. Thus, we will focus on the latter exception to the general rule.

Plaintiff's estoppel argument is without merit. In *Dellar*, this Court rejected the plaintiff's argument that the insurer's compliance with the thirty-day notice requirement constituted a condition precedent to denial of coverage based on failure to timely submit a sworn statement in proof of loss. *Id.* at 144. But this Court concluded that the insurer's breach of the thirty-day notice requirement was a factor relevant to whether an insurer is estopped from asserting the plaintiff's breach of the sworn proof of loss requirement as a defense. *Id.* Taking the insurer's breach of the thirty-day notice requirement as a factor to consider, the *Dellar* Court concluded that the plaintiff had raised a genuine issue of material fact regarding whether waiver or estoppel occurred sufficient to survive summary disposition. *Id.* at 147-148. In reaching this conclusion, this Court noted that the insurer had not advised the plaintiff that the sworn proof of loss was required by the policy, had not provided a copy of the contract before expiration of the sixty-day period, had not provided a proof of loss form for the plaintiff, and had not advised the plaintiff of the consequences of her failure to submit one. *Id.* at 142-143, 147.

The present case is distinguishable from *Dellar*. Here, plaintiff was advised that he was required to submit the sworn statement, he was provided with a copy of a sworn statement in proof of loss form, and he was advised of the consequences of failure to submit the form. While it is true that defendant did not inform plaintiff of the sworn statement requirement in its September 13, 2002 letter to plaintiff, defendant clearly put plaintiff on notice of the requirement in its October 9, 2003 letter. Further, through the October 9 notification defendant extended the submission period for an additional sixty days. Furthermore, plaintiff was given multiple reminders and chances to submit the form. In sum, defendant did everything that the *Dellar*

Court advised an insurer should do to rely on the defense of failure to provide the sworn statement. The trial court properly granted defendant summary disposition.<sup>1</sup>

Plaintiff next asserts that whenever a defense is based on a written contract, it is necessary to produce the contract. MCR 2.113(F); *Burrill v Michigan*, 90 Mich App 408, 412; 282 NW2d 337 (1979). Therefore, according to plaintiff, the trial court erred in not entering a default against defendant when defendant failed to produce a copy of the subject insurance policy. We agree, but do not find that such error warrants reversal under the circumstances. We review the trial court's decision whether to enter a default for an abuse of discretion. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003).

MCR 2.113(F)(1) states as follows:

If a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading as an exhibit *unless* the instrument is

(a) a matter of public record in the county in which the action is commenced and its location in the record is stated in the pleading;

(b) in the possession of the adverse party and the pleading so states;

(c) inaccessible to the pleader and the pleading so states, giving the reason; or

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<sup>1</sup> We note that even apart from the merits of this issue, it was appropriate for the trial court to grant summary disposition to defendant based solely on the fact that plaintiff failed to file a written response or any documentation in opposition to defendant's motion for summary disposition. Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. The movant on a (C)(10) motion bears the initial burden to produce supporting documentary evidence. Therefore, the moving party must specifically identify the undisputed factual issues, and support its position with affidavits, depositions, admissions, or documentary evidence. MCR 2.116(G)(3)(b); *Maiden, supra* at 120; *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The nonmovant then has the burden of showing that a genuine issue of disputed fact exists and to produce admissible evidence to establish those disputed facts. *Meagher v Wayne State Univ*, 222 Mich App 700, 719; 565 NW2d 401 (1997); *Neubacher, supra* at 420. The nonmovant "may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." *Maiden, supra* at 120, quoting MCR 2.116(G)(4). If the nonmovant "does not so respond, judgment, if appropriate, shall be entered against him or her." *Id.* at 120-121, quoting MCR 2.116(G)(4). Here, where plaintiff filed nothing in opposition to defendant's well-supported motion to show that a genuine issue of disputed fact existed, summary disposition was appropriate.

(d) of a nature that attaching the instrument would be unnecessary or impractical and the pleading so states, giving the reason. [Emphasis added.]

Defendant argues that the trial court did not abuse its discretion in denying plaintiff's motion for entry of default because multiple copies of the subject insurance policy were provided to plaintiff. However, merely providing copies of the policy to plaintiff, even assuming that claim is true, is not sufficient to meet the requirements of the court rule. There was no allegation in defendant's pleading that the policy was a matter of public record, that the policy was in the possession of the adverse party, that the policy was inaccessible to the pleader, or that attaching the instrument would be unnecessary or impractical. Thus, the court erred in indicating that defendant's submission of a certified copy of the insurance policy to plaintiff was sufficient to satisfy the court rule.

However, while objecting to defendant's failure to provide a copy of the insurance policy, plaintiff ignores that MCR 2.113(F)(1) states that "[i]f a *claim* or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading as an exhibit . . ." (Emphasis added.) Therefore, plaintiff bore the initial duty to provide a copy of the policy with his complaint. Although plaintiff purported to attach numerous exhibits to his complaint, none of those claimed exhibits was the subject insurance policy. Importantly, plaintiff also did not plead any permissible reason under MCR 2.113(F)(1) for failing to attach a copy of the policy as required by that court rule. Plaintiff could argue that he did not have a copy of the policy, but in that event his pleading should have stated that the policy was "in the possession of the adverse party" or that it was "inaccessible to the pleader and the pleading so states, giving the reason<sub>[r]</sub>." MCR 2.113(F)(1)(b) and (c). Thus, even absent our conclusion that summary disposition was proper, we would affirm the dismissal of plaintiff's cause of action where plaintiff failed to provide a copy of the insurance policy with his complaint. See *Stephenson v Union Guardian Trust Co*, 289 Mich 237, 241-242; 286 NW 226 (1939).

Finally, plaintiff argues that the trial court erred in denying his motion to amend his complaint. We disagree. We will not reverse a trial court's decision on a motion to amend a complaint absent an abuse of discretion that results in injustice. *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995).

MCR 2.118(A)(2) states: "Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." Further, our Supreme Court has set forth that:

A motion to amend ordinarily should be granted, and denied only for particularized reasons:

"In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.'" [*Ben P Fyke & Sons*,

*Inc v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973), quoting *Foman v Davis*, 371 US 178, 182; 83 S Ct 227; 9 L Ed 2d 222 (1962).]

A trial court should support its decision to deny an amendment with specific findings, *Fyke, supra* at 656-657, and failure to “specify one of the *Fyke* reasons in its denial . . . constitutes error requiring a reversal unless such amendment would be futile.” *Terhaar v Hoekwater*, 182 Mich App 747, 751; 452 NW2d 905 (1990). “On a motion to amend, a court should ignore the substantive merits of a claim or defense *unless* it is legally insufficient on its face and, thus, . . . it would be ‘futile’ to allow the amendment.” *Fyke, supra* at 660 (emphasis added).

Where a plaintiff merely restates or slightly elaborates on counts or allegations already pleaded, an amendment is futile, and the trial court does not abuse its discretion by denying a motion to amend. *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 76; 592 NW2d 724 (1998). Here, plaintiff’s allegations in the first three counts of his proposed amended complaint were verbatim identical to the first three counts pleaded in his original complaint. Accordingly, the trial court did not abuse its discretion in disallowing the amended complaint with respect to the first three counts.

Turning to the fraud count, a claim for fraudulent misrepresentation generally requires a showing by the plaintiff that:

(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*M & D, Inc v McConkey (M & D II)*, 231 Mich App 22, 27; 585 NW2d 33 (1998), quoting *M & D, Inc v McConkey (M & D I)*, 226 Mich App 801, 806; 573 NW2d 281 (1997); *Columbus Pipe & Equip Co v Sefansky*, 352 Mich 539, 542-543; 90 NW2d 492 (1958).]

Plaintiff’s fraud count actually alleged two types of misrepresentations: (1) misrepresentation of the documents necessary to show a satisfactory proof of loss and (2) misrepresentation by the statements made in defendant’s representative’s affidavit. Neither of these alleged misrepresentations is sufficient to state a valid claim of fraud.

With respect to the first alleged misrepresentation, plaintiff failed to show that defendant made a material misrepresentation. Again, while true that defendant did not inform plaintiff of the sworn statement requirement in its September 13, 2002 letter to plaintiff, defendant clearly put plaintiff on notice of the requirement in its October 9, 2003 letter. Further, although the October 9 notification only left plaintiff with seventeen days in the sixty-day submission period, defendant extended the submission period for an additional sixty days. Therefore, defendant did not make a material misrepresentation.

Turning to the second alleged misrepresentation, plaintiff’s allegation of fraud is wholly without merit. Any statements made in that affidavit were made after commencement of the

present litigation; thus, even accepting that there were material misrepresentations made in that affidavit, it is plain that plaintiff did not rely on those representations to his detriment.

Affirmed.

/s/ Patrick M. Meter

/s/ Christopher M. Murray

/s/ Bill Schuette